Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

October Term 2002

MARGARET A. APAO,

Petitioner,

vs.

THE BANK OF NEW YORK, As Trustee For Amresco Residential Mortgage Loan Trust 1997-3 Under The Pooling & Servicing Agreement Dated As Of September 1, 1997, SAN DIEGO HOME LOANS, INC., a California corporation, and ARM FINANCIAL CORPORATION, a California corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1

Do Hawaii's nonjudicial foreclosure laws enacted in 1874 — whose enforcement today depends entirely upon state ejectment judgments and is controlled by the policies of federally-chartered agencies such as Fannie Mae, Freddie Mac, and HUD in their regulation of what has become a national secondary mortgage market — involve sufficient overt official participation, as opposed to purely private action, so as to constitute "state action," invoking Fourteenth Amendment consumer due process guaranties within the subject matter jurisdiction of federal district courts?

2

Do consumers challenging the constitutionality of state nonjudicial foreclosure procedures have a right in federal district courts to conduct discovery and to a determination on the merits as to the existence of "state action" — on a case-by-case basis — before, as here, such due process complaints may be summarily dismissed *per se*, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for failure to state a claim for relief?

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I. JURISDICTIONAL STATEMENT

The jurisdiction of the district court was based in part upon Section 1601, et seq. of Title 15 and Sections 1331 and 1337 of Title 28 of the United States Code, and the Fifth and Fourteenth Amendments to the United States Constitution.

This Court has jurisdiction to review this *Petition for Writ of Certiorari*, timely filed by U.S. Mail on August 4, 2003, within ninety days (weekends excluded) of the denial of rehearing by the court of appeals on May 5, 2003, pursuant to Section 1254(1) of Title 28 of the United States Code and Supreme Court Rules 10(c) and 13(3).

II. AUTHORITATIVE PROVISIONS

The court of appeals' published opinion being challenged in Apao v. Bank of New York, 324 F.3d 1091 (9th Cir. 2003) is set forth in the Appendix to this Petition, together with the relevant district court decisions; the relevant controlling federal and state constitutional and statutory provisions are footnoted in the text of this Petition.

III. STATEMENT OF THE CASE

On June 30, 1997, Apao obtained a mortgage loan on her residence located at 4763 Matsonia Drive in the City and County of Honolulu in the amount of $283,000 from San Diego Home Loans.

Her 1997 Note makes no mention of her lender having a "power of sale" over the mortgaged property in the event of default.

Her 1997 Mortgage states in its beginning, unnumbered, preprinted, boilerplate clauses merely that "Borrower does hereby mortgage, grant and convey to Lender, with power of sale, the following property described," and in Paragraph 19 thereof states that "if the default is not cured . . . Lender . . . may invoke the power of sale and any other remedies permitted by applicable law."

On June 6, 2000, ARM, a third party corporation purporting to represent her lender's current assignee, Bank of New York, served Apao with a "Notice of Default and

Intention To Foreclose Mortgage," scheduling a public auction sale for August 22, 2000, at 12:00 Noon, to be conducted by ARM, requiring, *inter alia*, that the successful bidder have 10% of the bid price in cash at the auction sale and that the 90% balance in cash be immediately tendered "five (5) business days" thereafter.

At the time that Apao entered into her mortgage loan, she was required to sign the Note and Mortgage without being allowed adequate time to read and to understand the terms and the language of same, which were not explained to her, and she was not provided with copies of the Note and Mortgage beforehand prior to loan closing, nor by background or experience did Apao have the ability to understand same, and nowhere in the Note or Mortgage is the phrase "power of sale" explained, and nowhere in the Note or Mortgage is the effect of the phrase "power of sale" explained.

The auction sale was held by ARM *after* Apao, in response to the notice, filed her complaint in district court, and even *after* she had sent a timely TILA cancellation notice, rescinding the mortgage loan as a matter of federal law, a separate, TILA issue that still awaits adjudication in the district court -- the court of appeals incorrectly in its beginning paragraph stating that she had "lost her home".

In retaliation, Bank of New York proceeded to file a complaint for ejectment in state court, based on that nonjudicial foreclosure, which is still pending, with Apao today remaining in possession of her residence in Hawaii.[1]

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[1] Section 667-5 of the Hawaii Revised Statutes provides, in relevant part:

"When a power of sale is contained in a mortgage, the mortgagee, or the mortgagee's successor in interest, or any person authorized by the power to act in the premises, may, upon a breach of the condition, give notice of the mortgagee's, successor's, or person's intention to foreclose the mortgage and of the sale of the mortgaged property, by publication of the notice once in each of three successive weeks (three publications), the last publication to be not less than fourteen days before the day of sale, in a newspaper having a general circulation in the county

Apao's federal lawsuit was sufficient to scare away the purchasers who, vulture-like, specialize in buying nonjudicially foreclosed properties at distress prices, whose winning bid was less than one-half of what a mere vacant lot adjoining Apao's property, for example, subsequently sold for at a judicial foreclosure auction sale. Bank of New York, however, let them out of the purchase in exchange for its substituting in their place as the nonjudicial purchaser.

Such nonjudicial foreclosure sales have their roots in the 14th and 15th centuries, when ruthlessly harsh common law enforcement doctrines emerged in English law regarding real property mortgages, reflecting their relative importance at the time, not the least of which was that if payment was not made precisely on the due date, known as "law day," the mortgagor immediately forfeited all ownership interest in the property whatsoever, Jack Jones & J. Michael Ivens, *Power of Sale Foreclosure in Tennessee: A Section 1983 Trap*, 51 Tenn. L. Rev. 279, 2890 (1984).

"Law day" forfeitures were absolute until the courts of equity in England understandably -- but belatedly -- intervened, allowing "redemption" after "law day" due to fraud, misrepresentation, accident, or duress, eventually recognizing a general redemption right as itself an equitable estate in land, Grant S. Nelson & Dale A. Whitman, *Real Estate Finance Law*, Section 7.29 (3d ed. 1994).

In the United States, most foreclosures today involve a public sale of the property. The most popular form of foreclosure, and the only form available in many states, is that of a *judicial* foreclosure, which as the name implies involves a full, judicially supervised proceeding. A second method is known as a *nonjudicial* sale – typically conducted

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in which the mortgaged property lies; and also give such notices and do all such acts as are authorized or required by the power contained in the mortgage. Copies of the notice shall be filed with the state director of taxation and shall be posted on the premises not less than twenty-one days before the day of sale."

by either a public official or an impartial "trustee" – involving no judicial supervision.

The actual procedures for non-judicial sales vary widely among States.[2]

Hawaii's 1874 non-judicial foreclosure law is truly one of the most draconian still being strictly enforced today, uniquely allowing the mortgagee itself to advertise and to conduct the sale and also to record a transfer of title, after merely posting a public auction notice on the premises and publishing three consecutive weekly advertisements, with no

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[2] At least twenty-eight jurisdictions authorize power of sale foreclosure by statute: **Alabama**, Ala. Code SS 35-10-1 to -16 (1991); **Alaska**, Alaska Stat. SS 34.20.070-.090 (1962 & Supp. 1994); **Arizona**, Ariz. Rev. Stat. Ann. SS 33-807 to -821 (1990 & Supp. 1994); **California**, Cal. Civ. Code SS 2924- 2924k (West 1993 & Supp. 1995); **Colorado**, Colo. Rev. Stat. SS 38-38-101 to -201 (Supp. 1994); **District of Columbia**, D.C. Code Ann. 55 45-715 to -716 (1990); **Georgia**, Ga. Code Ann. SS 23-2-114 to -115 (1982); **Hawaii**, Haw. Rev. Stat. SS 667-5 to -10 (1988 & Supp. 1994), and new, alternative Stat. SS 667-21 to -42; **Idaho**, Idaho Code SS 45-1502 to -1515 (1977 & Supp. 1995); **Maine**, Me. Rev. Stat. Ann. tit. 14, SS 6201-6209 (West 1964 & Supp. 1994); **Maryland**, Md. Code Ann., Real Prop. S 7-105 (1988 & Supp. 1994); **Massachusetts**, Mass. Gen. Laws Ann. Ch. 244, SS 11-17C (West 1988 & Supp. 1995); **Michigan**, Mich. Comp. Laws Ann. SS 600.3201-.3280 (West 1987 & Supp. 1995); **Minnesota**, Minn. Stat. Ann. SS 580.01-.30 (West 1988 & Supp. 1995); **Mississippi**, Miss. Code Ann. SS 89-1-53 to -59 (1972); **Missouri**, Mo. Ann. Stat. SS 443.410-.440 (Vernon 1986 & Supp. 1995); **Montana**, Mont. Code Ann. SS 71-1-223 to -224 (1993); **Nevada**, Nev. Rev. Stat. Ann. S 107.080-.100 (Michie 1994); **New Hampshire**, N.H. Rev. Stat. Ann. SS 479:22-:27-a (1992 & Supp. 1994); **North Carolina**, N.C. Gen. Stat. SS 45-21.1 to -21.33 (1991 & Supp. 1994); **Oregon**, Or. Rev. Stat. Ann. SS 86.705 to -.795 (Butterworth 1988 & Supp. 1994); **Rhode Island**, R.I. Gen. Laws SS 34-27-I to -5 (1984 & Supp. 1994); **South Dakota**, S.D. Codified Laws Ann. SS 21-48-1 to -26 (1987 & Supp. 1995); **Tennessee**, Tenn. Code Ann. SS 35-5-101 to -114 (1991 & Supp. 1994); **Texas**, Tex. Prop. Code Ann. S 51.002; Utah, Utah Code Ann. SS 57-1-23 to -28 (1994); **Washington**, Wash. Rev, Code Ann. SS 61.24.020-.090 (West 1990 & Supp. 1995); **West Virginia**, W. Va. Code SS 38-1-3 to -5 (1985 & Supp. 1994); **Wyoming**, Wyo. Stat. SS 34-4-101 to -113 (1990).

open houses, no official transcripts of proceedings, and with prior notice being required only to those junior lienholders previously requesting same -- the private transfer of title purportedly being effective upon the unilateral recordation of the auction notice and a mere self-serving affidavit of sale.

What has historically been little known until now is the fact that, according to researchers at the University of Hawaii, Section 667-5 was enacted in 1874 to enable wealthy residents to steal land from the Hawaiian people, and fell into disuse until only a few years ago after Hawaii appellate courts began to judicially protect borrowers from predatory lending practices in *judicial* foreclosures.[3]

Relevant excerpts from Professor Robert Hammond Stauffer's treatise, *Land Tenure in Kahana, Hawai`i, 1846-1920* (1990), before the recent surprise resurrection of Section 667-5 by mostly Mainland lenders, are instructive:

> The 1874 Act uses "mortgage" in a manner that bears almost no resemblance to the modern meaning of the term. Homes were put up as collateral for large loans for purely personal purposes. It permitted very high interest rates, and very short terms (often 2-3 years). It permitted a lender to unilaterally auction off a borrower's deed without judicial review. The only notice required could be placed in a paper's legal notices' section. The Act apparently permitted auction bidders to conspire with the lender to secure the deed . . . . "Mortgages" of the form allowed under

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[3] See, *e.g.*, GE Capital Hawaii, Inc. v. Miguel, 92 Haw. 236, 241, 990 P.2d 134, 139 (App. 1999); Hawaii Community Federal Credit Union v. Keka, 94 Haw. 213, 11 P.3d 1 (2000); GE Capital Hawaii, Inc. v. Yonenaka, 96 Haw. 32, 25 P.3d 807 (App. 2001); Beneficial Hawaii, Inc. v. Kida, 96 Haw. 289, 30 P.3d 895 (2001), Ocwen Federal Bank, FSB v. Russell, 99 Haw. 173, 53 P.3d 312 (App. 2002); Associates Financial Services Company of Hawaii, Inc. v. Richardson, 99 Haw. 446, 56 P.3d 748, reconsideration denied, 99 Haw. 310, 54 P.3d 946 (App. 2002).

> the 1874 Act are illegal today, as they are prone to result in the loss of the borrower's home and land, a fact that occurred with deadening regularity in Hawai`i in the late 19th century [pages 112-113].
>
> The speculator-investors who made use of the 1874 "Mortgage" Act were major actors in the alienation of Hawaiians from their land. They were of varying political stripes, from annexationist to Royalist [page 115].
>
> Castle [for example] appears to have been actively prospecting for land in Kahana, and mortgages were the tool he used in acquiring land titles [from Hawaiians] [page 115].
>
> Hawaiians' cultivated lands, however – the priceless kuleana holdings – seriously began to be lost after the advent of the egregious Mortgage Act of 1874 [page 120].

Today, nonjudicial foreclosure procedures are serving other "masters" – who tightly control the national secondary mortgage market -- three quasi-federal agencies, chartered by express Acts of Congress, commonly known as Fannie Mae, Freddie Mac, and HUD.

These federally-charted agencies in recent years have assumed control of all major nonjudicial foreclosure decisions in the private mortgage industry: (1) dictating to lenders and assignees desiring access to the secondary mortgage market, for instance, that they must elect nonjudicial foreclosure remedies, (2) dictating how much lenders and assignees desiring access to the secondary mortgage market can bid at nonjudicial foreclosure auctions, despite what may be true market value, (3) dictating who the attorneys are who are permitted to represent lenders and assignees desiring access to the secondary mortgage market at nonjudicial foreclosures, and (4) even dictating how much lenders and assignees desiring access to the secondary

mortgage market are permitted to pay their attorneys.

Such all-pervasive, behind-the-scenes control by such federally-chartered agencies, hiding their real-party-in-interest status from state courts in mortgage foreclosure litigation fronted by creditors who no longer even have a financial interest in the property, while pulling virtually every "state action" string imaginable, is openly admitted in their official Website pronouncements, which are set forth as directives to controlled lenders and assignees depending upon financial access to the secondary mortgage market.

For instance, Freddie Mac is now directly controlling every aspect of nonjudicial foreclosures in the State of Hawaii – as elsewhere:

> In recent months, our Nonperforming Loans department worked with many of you ["sellers and servicers"] who service Mortgages for us to test the nonjudicial foreclosure process in the State of Hawaii. Historically, foreclosure actions in Hawaii have been conducted under the judicial process. Our analysis has confirmed that the nonjudicial foreclosure process is quicker, easier and less costly than the judicial process. Under the judicial foreclosure process [in Hawaii], the average foreclosure takes from 8 to 10 months to conclude and costs have reached as high as $1,850 [another fraud on state trial courts who are requested to and who award fees and costs several times that]. The nonjudicial process reduces the foreclosure process to as little as 4 months in time and to $1,200 in costs. As a result, effective October 1, 1999, when you refer to one of **our Mortgages** for foreclosure in the State of Hawaii, you must instruct your attorney or trustee that he or she must use the nonjudicial process. . . . In addition, we are amending the amounts we will reimburse for foreclosures in Hawaii as follows: attorney

> fees - $1,200; eviction costs - -$500 [September 30, 1999, Servicer Bulletin, pp. 1-2] [bracketed commentary emphasis added].
>
> Effective for all Hawaiian [sic] cases where the first legal action to initiate non-judicial foreclosure occurs on or after October 1, 2001, mortgagees' performance in prosecuting non-judicial foreclosures will be measured according to the reasonable diligence time frames provided in Attachment 2 [Mortgagee Letter 2001-19, dated August 24, 2001, pp. 1-2].

The same is true for Fannie Mae, whose relevant "announcements" shown on its official Website also seek to trade the savings of a few hundred dollars for the due process rights of Hawaii borrowers, are most notably:

> From time to time, we review our foreclosure-related procedures to evaluate their effectiveness and to identify changes that may be appropriate for one reason or another. This announcement discusses several changes . . . changing the predominant method in Hawaii to nonjudicial foreclosure (and requiring our prior approval before using judicial foreclosures in a few new jurisdictions) . . . [Announcement 01-03, dated June 6, 2001, p.1]
>
> ANNOUNCEMENT 02-04 Summary: Provides new foreclosure bidding instructions for conventional first mortgages designed to assure a third party's bidding at the foreclosure sale will not result in Fannie Mae eventually acquiring the property for more than the total mortgage indebtedness or for less than Fannie Mae's "make whole" amount [in other words, rigging the bidding in advance tied not to market value but to loan amount] [Fannie Mae – Single Family Update

Summaries, dated March 29, 2002, page 1] [bracketed commentary added].

Hawaii's 1874 nonjudicial foreclosure laws have for 129 years victimized Hawaii residents, who have lost probably trillions of dollars in residential equity, controlled today by the new rulers of the secondary mortgage market.

IV. LEGAL ARGUMENT

A. Introduction: What Is "State Action"?

In general, this Court has repeatedly held that a three-step analysis is required to determine whether there has been a due process violation as that alleged here:

> There, *first*, must exist a deprivation by the state or by a private person or entity who may fairly be treated as the state ("state action"), of, *second*, a constitutionally cognizable life, liberty, or property interest, without, *three*, due process of law.[4]

If one of these issues is missing, the challenged statute, it is said, is not a violation of due process, no matter how discriminatory or wrongful the conduct may in fact be.[5]

The only element supposedly found waiting in Apao by both the district court and the court of appeals' panel below was this Court's requirement of "state action".

This Court in the past has recognized that the task of determining whether "state action" exists in a given context is not that easy, since few cases raise the issue in instances where government officials act directly, or a private person

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[4] This Court initially took a two-prong approach where no "state action" inquiry was required, Ingraham v. Wright, 430 U.S. 651, 672 (1977), which was expanded to include a "state action" test in Martinez v. California, 444 U.S. 277, 284-285 (1980); but see also Parratt v. Taylor, 451 U.S. 527, 536-537 (1981), which added a fourth test ("acting under color of state law"), not however applicable here.

[5] Blum v. Yaretsky, 457 U.S. 991, 1002 (1982), citing with approval Shelly v. Kramer, 334 U.S. 1, 13 (1948).

acts without any involvement whatsoever by state or federal officials.

Instead, the issue is usually presented on "middle ground" facts where the challenged conduct is neither purely state action, nor purely private action.

As this Court explained in Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349-350 (1974), for instance:

> While the principle that private action is immune from the restrictions of the Fourteenth Amendment is well established and easily stated, the question whether a particular conduct is "private," on the one hand, or "state action," on the other, frequently admits of no easy answer.

It was in Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961), and in Reitman v. Mulkey, 387 U.S. 369, 378 (1967), that this Court opened the door to a more liberal interpretation of "state action" in related consumer due process contexts; see, *e.g.*, 387 U.S. at 378, quoting from Burton:

> This Court has never attempted the "impossible task" of formulating an infallible test for determining whether the State "in any of its manifestations" has become significantly involved in private discriminations. "Only by sifting facts and weighing circumstances" on a case-by-case basis can a "nonobvious involvement of the State in private conduct be attributed its true significance".

Nevertheless, the district court as well as the Ninth Circuit panel below surprisingly made no effort whatsoever to identify or to weigh the facts and circumstances, but merely concluded that there was no state action, since "no party has yet challenged the Hawaii State [nonjudicial foreclosure] statute," and "no other court has so found."

B. Are Nonjudicial Foreclosures "State Action"?

This Court in its entire history has yet to directly address this fundamentally important issue concerning the constitutionality of nonjudicial foreclosures in the context of state action.[6]

Despite the obvious importance to the American public of protecting their investment in their homes, which for most consumers in the United States is one of the biggest -- if not the biggest -- financial and emotional investments they will ever make in their entire family's lifetime, due to the historical roots of the nonjudicial foreclosure laws in England and thereafter in the United States, established well before due process rights emerged, it was not until this Court in Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), Fuentes v. Shevin, 407 U.S. 67 (1972), and in North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975), began to develop constitutionally-sensitive procedural due process safeguards requiring notice and an opportunity to be heard, specifically protecting consumers from the capricious loss of valuable economic rights, that borrowers throughout the United States finally began to question, in both state and federal court proceedings, the constitutionality of confiscatory nonjudicial foreclosure laws.

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[6] The closest that this Court has come to this precise issue here was 77 years ago in Scott v. Paisley, 271 U.S. 632, 635 (1926) ("the validity of such a contractual power of sale is unquestionable"), when -- without however discussing "state action" or confronted with a nonjudicial foreclosure sale, the issue before it being only as to notice -- it rejected a constitutional attack on a Georgia statute which at that time allowed a trustee holding title as security by deed under a mortgage to obtain a judicial judgment by exercising its power of sale therein without notice to the borrower, a result that few would suggest would be upheld today. Paisley is clearly inapposite here for many other reasons, including the fact that it involved judicial intervention to rubber-stamp the trustee's transfer of title, and also since Hawaii is a "lien theory" state, Federal Home Loan Mortgage Corp. v. Transamerica Insurance Co., 89 Haw. 157, 164, 969 P.2d 1275, 1282 (1998), title in Hawaii remains with the borrower until foreclosed upon, notwithstanding any "power of sale" clause to the contrary contained in the mortgage document.

However, although the Fifth and Fourteenth Amendments prohibit the federal government and the States from depriving persons of property without due process of law, their purpose had long been understood to be to protect the people from the state *and not citizens from one another*, United States v. Cruiksank, 92 U.S. 542, 554 (1875), and nonjudicial foreclosure processes therefore, no matter how unfair and unjust they might have been thought to be, it was earlier concluded that they could not be constitutionally attacked unless "state action" could also be shown.[7]

Opponents of nonjudicial sales were initially encouraged in the early 1970s by the decisions of this Court, for instance, in Burton and in Reitman, *supra*, coupled with this Court's then more recent consumer protection holdings in Sniadach, Fuentes and North Georgia Finishing, *supra*.

And, although at first several energetic district courts, appropriately following this Court's instructions to sift through the facts, thereafter did conclude that certain state nonjudicial procedures did involve state action and clearly violated procedural due process of law, Garner v. Tri-State Development Co., 382 F. Supp. 377 (D. Mich. 1974), and Turner v. Blackburn, 389 F. Supp. 1250 (D. N.C. 1975), most other federal courts were reluctant to rethink the older precedents and refused in the 1970s to change the older view in the absence of leadership from this Court, finding no state action involved in such recorded auction sales -- no matter how blatantly unfair the state nonjudicial foreclosure laws brought before them candidly appeared.[8]

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[7] The Fourteenth Amendment provides that "no state shall deprive any person of life, liberty, or property, without due process of law."

[8] Most notably among these decisions, all revealingly decided within a single twelve-month period, were four head-in-the-sand cases, in chronological order: Bryant v. Jefferson Federal Savings and Loan Association, 509 F.2d 511 (D.C. Cir. 1974); Barrera v. Security Building & Investment Corp., 519 F.2d 1166 (5th Cir. 1975); Lawson v. Smith, 402 F. Supp. 851 (D. Calif. 1975); and Northrip v. Federal National Mortgage Association, 527 F.2d 23 (6th Cir. 1975), *reversing* 372 F. Supp. 594 (1974), which had found state action to exist. Based on the

The fact that those earlier decisions, all rendered mostly more than a quarter of a century ago, found no state action in the nonjudicial foreclosure procedures which they examined, should not be determinative, a generation later, it is submitted, for several important reasons:

First, not only has mortgage lending throughout the United States, and the federal regulatory scheme governing residential mortgage lending, dramatically changed since the mid-1970s.

Second, not only do the vast majority of residential mortgages in the United States now involve various forms of state action due to official involvement in and encouragement of the secondary mortgage market, which depend for their enforcement totally upon judicial intervention.

But third, Hawaii's 1874-enacted Section 667-5 nonjudicial foreclosure statute operates today in a way substantially dissimilar from those nonjudicial foreclosure statutes previously found in the mid-1970s not to have involved state action.

C. Why "State Action" Concepts Need Rethinking.

This Court has admittedly itself had enormous difficulty in its own decisions determining when "state action" can or cannot be said to exist in a given set of facts, and has only been able to identify in general language, usually by a split vote, at least three situations in which "private action" is said, at least theoretically, to rise to the level of "state action" so as to invoke due process guarantees similar to those championed here.

Bryant-Barrera-Lawson-Northrip line of cases, other courts were quick to find no "state action" in nonjudicial foreclosure sales within their jurisdictions; see, *e.g.*, Kenly v. Miracle Properties, 412 F. Supp. 1072 (D. Ariz. 1976); Cramer v. Metropolitan Savings and Loan Association, 401 Mich. 252, 258 N.W.2d 20 (1977); including in the Ninth Circuit in Charmicor, Inc. v. Deaner, 572 F.2d 694 (9th Cir. 1978) (specifically upholding Nevada's nonjudicial foreclosure law procedures at that time), relied upon by the Ninth Circuit panel below.

None of those three "tests" by themselves, despite being expressed in prior cases, has really been especially helpful in understanding or in apparently deciding such cases, representing in reality not "triggers of thought" -- as it were -- but merely "conclusions of thought," serving as convenient rationalizing *labels* once the Justices have or have not first found state involvement to be extensive enough, for whatever reason, so as to warrant in individual circumstances, presumably on underlying and compelling public policy grounds, a finding of "state action" for due process purposes in what were considered appropriate cases.

Thus, the decision-making calculus in such cases is far less than automatic as the district court and the Ninth Circuit panel below assumed.

First, a State will be held responsible, it has been said, for "private action" if it encourages or commands it, but not merely if it only acquiesces in it by simply delineating the situations in which private, contractually-acquired rights can be carried out if so elected by the parties (*the encouragement nexus*), Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) (holding that a private warehouseman's sale under a UCC self-help provision did not there constitute "state action").

It should be noted, however, that even in Flagg, this Court was closely divided --five-to-three -- in finding no "state action," the minority, relying on prior consumer protection decisions, such as in Sniadach, Fuentes, and North Georgia Finishing, *supra*, viewed the majority's "encouragement test" as constitutionally blurry, instead emphasizing the state's traditional role in lien execution by forced sale, not unlike the situation in the enforcement of nonjudicial foreclosures at least in *lien theory* states such as Hawaii which has no right of redemption, and emphasizing that New York had thus by statute authorized the warehouseman to perform a forced sale which was clearly to them a state function, and criticizing the majority for approaching the "state action" issue before it "as if it can be decided without reference to the role that the State has

always played in lien execution by forced sale. In so doing, the Court treats the State as if it were, to use the Court's words, 'a monolithic, abstract concept hovering in the legal stratosphere,'" 436 U.S. at 168.

Second, a State will be held responsible, it has been said, for "private action" where a private person, according to other decisions of this Court, is permitted to perform traditionally exclusive government functions (*the governmental function nexus*), Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352-353 (1974) (holding that a utility company's termination of service did not constitute "state action," although it was a partial monopoly, because state law imposed no obligation on the state to furnish utility services and the termination procedures were not required by the state but merely permitted by its procedures).

This Court in Jackson, however, was also split, six-to-three, with Justice Douglas the most vocal critic of the then majority, demonstrating as a practical matter how uncertain the Court's "state action" jurisprudence has actually been as a barometer for future cases, 419 U.S. at 361-362:

> In Burton v. Wilmington Parking Authority, 365 US 715, 6 L. Ed 2d 45, 81 S Ct 856 (1961), we said: "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance," . . . . As our subsequent discussion in Burton made clear, the dispositive question in any state-action case is not whether any single fact or relationship presents a sufficient degree of state involvement, but rather whether the aggregate of all relevant factors compels a finding of state responsibility. . . . It is not enough to examine seriatim each of the factors upon which a claimant relies and to dismiss each individually as being insufficient to support a finding of state action. It is the

aggregate that is controlling.

Third, a State will be held responsible, it has been said, for "private action" if the state and those acting privately have a mutually dependent or "symbiotic" relationship (*the interdependence nexus*), Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (finding state action where a state parking authority built a parking facility which included commercial shop space, and one of its private restaurant lessees served only white persons), *supra*.

However, although the interdependence nexus is still occasionally referred to in the cases, its obviously unhelpful vagueness has resulted in it rarely being of assistance in such decision making, again representing more the "conclusion of thought" than an actual "trigger of thought"; see, *e.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (again a six-to-three decision, the majority finding no state action where a private club licensed by the state liquor board was said to discriminate); and Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (another six-to-three divided court on the issue of state action).

More recent Supreme Court decisions further illustrate the ease with which such tests can be articulated, yet how their application in individual cases has brought continually sharp disagreement among individual Justices.

In Blum v. Yaretsky, 457 U.S. 991 (1982) (concluding that a nursing home's decision to discharge or transfer Medicaid patients to lower levels of care was not state action), for instance, this Court, by a majority of six, with one Justice concurring on other grounds and with two Justices dissenting, although appearing to agree on what are the state-action tests in general, saw the facts before them entirely differently.

The methodology of the majority in Blum was to focus first on what they termed "the gravamen of plaintiff's complaint," 457 U.S. at 1003, by first deciding "whether the private motives which triggered the enforcement of those

laws can fairly be attributed to the State," *id.* at 1004, and then to determine, second, if the private conduct was extensively regulated, third, whether the state exercised coercive powers or encouraged either overtly or covertly the private act, *or*, fourth, whether the private party exercised powers that are "traditionally the exclusive prerogative of the State," *id.* at 1004-1005.

The dissenters in Blum instructively did not quarrel with the tests, only with how the majority applied the law to the facts, 457 U.S. at 1013-1014:

> The Court today departs from the Burton precept, ignoring the nature of the regulatory framework presented by this case in favor of the recitation of abstract tests and a pigeonhole approach to the question of state action. But however correct the Court's tests may be in the abstract, they are worth nothing if they are not faithfully applied. Bolstered by its own preconception of the decisionmaking process challenged by respondents, and of the relationship between the State, the nursing home operator, and the nursing home resident, the Court subjects the regulatory scheme at issue here to only the most perfunctory examination. The Court thus fails to perceive the decisive involvement of the State in the private conduct challenged by the respondents.

A close reading of the Ninth Circuit panel's opinion below leaves one with a complete and profound feeling of inadequacy, as no attempt whatsoever was made to analyze the actual facts at issue here in determining, as this Court has continually instructed, precisely why such legislative encouragement and judicial enforcement of Section 667-5 in Hawaii is or is not to be considered "state action."

More recently, in Morse v. Republican Party of Virginia, 517 U.S. 186 (1996) (a state political party's imposition of a fee as a condition for participating in its

nominating convention held subject to the pre-clearance requirements of the Voting Rights Act), this Court, for instance, was even more sharply divided on the issue of state action, 517 U.S. at 275, this time five Justices finding "state action," which led several dissenting Justices to then question whether the Court was abandoning the stricter "state action" requirements announced decades earlier in Jackson, Blum, and Flagg, *supra*, altogether.

This frankly confusing, uncertain, and changing body of precedent should be clarified by this Court if lower courts are to be expected to "sift through the relevant facts" and "weigh the relevant circumstances," which in Apao they openly refused to do.

For otherwise federal case precedents, which a quarter of a century ago often viewed nonjudicial foreclosure procedures as merely "private action" resulting from the private choices of contracting parties only, will remain totally at odds with the harshness of nonjudicial forfeitures, with the modern realities of the national secondary mortgage market, with the new federal and state regulatory schemes, and with the due process rights of consumers everywhere.

D. Nonjudicial Foreclosure in Hawaii Is "State Action".

The mortgage world has changed dramatically in recent decades, and the "state action" issue presented in nonjudicial foreclosure cases a generation ago, which led some courts, with broad-brush logic, to the quick conclusion, as discussed *supra*, that such "power of sale" agreements definitionally involved only "private consensual action" and not "significant state action," in no way resembles the facts presented in such cases today, especially when the uniquely harsh and oppressive draconian aspects of Hawaii's nonjudicial foreclosure laws are directly addressed.

The gravamen of Apao's complaint is that she – like other borrowers in Hawaii – were unknowingly forced into a government-sponsored and government-written form adhesion contract containing a "power of sale" clause – which was neither explained in the mortgage document itself

nor personally to her when her loan transaction was consummated – which locked her unwittingly into state-sponsored, nonjudicial mortgage enforcement remedies wholly lacking in any traditional due process protections, the most offensive of which is sale by biased and partial auctioneers in Hawaii.

The following *five nexus points* are some of the major offending "state action" ingredients, it is submitted, in such modern day nonjudicial Section 667-5 foreclosures in Hawaii, all of which collectively constitute a pattern of "state action" -- encouraging a disturbing predatory proliferation of bedrock due process violations.

First, the "power of sale" clause found in Apao's pre-printed, standardized-form mortgage contract represents the purest form of government-sponsored adhesion contracts imaginable, neither anywhere defined nor explained, in a take-it-or-leave-it, last-minute signing ceremony, where the parties have clearly unequal bargaining power nationwide.

Apao, for instance, was not even shown the mortgage document until being asked to sign at closing. Nowhere is the phrase "power of sale" defined or explained, or was it ever explained to her.

Apao is not an attorney and has no understanding of the meaning of those words. How many lawyers even do?

Indeed, her mortgage itself is *contradictory* in that regard, assuring the borrower of the "right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale."

Such contracts of adhesion, and their legal consequences, characterized by standardized forms prepared or submitted by one party which are offered for rejection or acceptance to another party without an opportunity for review or for bargaining, and under circumstances where the parties have unequal bargaining power, are everywhere proscribed and held to be unenforceable, as is the case in Hawaii, whose contract law governs here, by an unbroken line of cases; see, *e.g.*, Potter v. Hawaii Newspaper Agency,

89 Haw. 411, 424, 974 P.2d 51 (1999); Brown v. KFC National Management Co., 82 Haw. 226, 246-247, 921 P.2d 146 (1996); Leong v. Kaiser Foundation Hospital, 71 Haw. 240, 247-248, 788 P.2d 164 (1990).[9]

Second, Apao's universal, standardized-form mortgage containing that "power of sale" clause was written -- and in fact is embodied in a printed form required for all home mortgage loan closings -- by government chartered agencies pursuant to the creation and encouragement of a national secondary mortgage market in the United States.

Such boilerplate forms as Apao's Note and Mortgage were prepared pursuant to the requirements of government regulators, pursuant, for example, to Section 203.17 of Title 24 of the Code of Federal Regulations, which is only one of many such regulatory prescriptions, of which this Court may take judicial notice, in order specifically to enable lenders and their assignees, as a requirement for government-backed federal agencies to purchase and/or to financially underwrite such mortgages, and for such mortgages to be freely traded, for liquidity purposes, by lenders and their assignees.

"Power of sale" clauses in residential mortgages today are in effect, however unintended, little more than government-sponsored adhesion contracts, forced upon lenders and borrowers alike, to the advantage of the former and to the disadvantage of the latter.

In the early cases finding no "state action" in the enforcement of state nonjudicial foreclosure laws, the fact that such "power of sale" clauses were in fact "contracts of adhesion" was never considered; for instance, in Barrera, *supra*, 519 F.2d at 1171, the Fifth Circuit Court of Appeals concluded that Texas' enforcement of its nonjudicial

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[9] The enforcement of contracts of adhesion also has further obvious constitutional ramifications where, as here, there is a loss otherwise of substantial property rights without notice and a hearing; see, *e.g.*, D. H. Overmyer Co., Inc. of Ohio v. Frick, 405 U.S. 174 (1972) (full awareness of legal consequences is required before a waiver is considered voluntary and effective).

foreclosure laws "did not aid, support, or encourage foreclosures under powers of sale," but only because the parties "have bargained for the remedy," which was clearly not so in this case, or generally -- if not always so -- in the national secondary mortgage market in Modern America.

Third, such judicially unsupervised, nonjudicial foreclosure procedures are today especially troubling from a due process perspective, due to the welcome proliferation of federal and state consumer protection statutes in recent decades, not the least of which are the protections against predatory lender abuses embodied within the federal Truth-In-Lending Act ("TILA"), whose implementation can easily otherwise be effectively sidestepped, if not fully nullified, through judicially unsupervised, expedited invocation of "power of sale" clauses designed, in apparent retaliation, to cut off TILA rescission rights after receiving timely mortgage cancellation notices.[10]

Since earlier "state action," nonjudicial foreclosure cases were decided, the United States Congress and most State Legislatures have now understandably passed comprehensive consumer protection statutes, in fact dozens in number, which provide borrowers with numerous defenses to foreclosure other than the traditional mere payment or accounting defenses.

Here, for instance, Apao rescinded her mortgage, based on TILA violations, and canceled her mortgage in a timely manner, yet – with full knowledge and notice of her timely TILA rescission claim and federal lawsuit – Bank of

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[10] This would be especially true where property is sold to third parties at a nonjudicial foreclosure sale, potentially giving such allegedly innocent purchasers if not proper legal title, at least an equitable title, that might complicate matters. In the Apao case, for instance, Apao's lender's present assignee, Bank of New York, stepped back into the picture, accepted supposedly an "assignment" from the successful third-party bidders and legal title – an apparent ruse to enable it to claim equitable rights there through the "successful" original bidders and not as the lender's current assignee merely bidding on its own at the nonjudicial foreclosure sale.

New York through ARM nevertheless invoked the "power of sale" clause in her mortgage and attempted to sell, and even unilaterally to transfer legal title to her property, while ignoring her federal lawsuit over the same subject matter pending at the same time before the district court below.[11]

Thus, Bank of New York on appeal has been forced into the illogical position of defending a right to have mortgaged property nonjudicially foreclosed upon by it after the underlying mortgage containing the "power of sale" clause -- upon which its nonjudicial foreclosure is jurisdictionally based as "private action" -- had beforehand been rescinded and rendered unenforceable as a matter of federal law.

Fourth, Hawaii now has a two-tiered nonjudicial foreclosure law, lenders (or their current assignees) empowered to proceed at their sole discretionary election pursuant to the older 1874 nonjudicial procedures, Section 667-5, *et seq.*, or pursuant to a newer version of the law, Section 667-21, *et seq.*, enacted a few years ago, which provides more elaborate, due process requirements, including requiring that lenders notify borrowers in writing prior to loan closing precisely what a "power of sale" is and means – clearly one of the most forward-looking nonjudicial foreclosure statutes in the entire Nation (yet merely a non-mandatory alternative to Section 667-5 only, and in Hawaii, since its passage, virtually never once invoked by lenders or their assignees, who no wonder prefer Section 667-5 instead.

Thus, Hawaii cannot be said to be merely providing nonjudicial remedies at the voluntary election of private parties, for not only are such "power of sale" clauses clearly "contracts of adhesion," but Hawaii has now provided by state action additional "power of sale" remedies *to lenders only* – the election of which is not provided for by private contract at all, but rests in the creditor's sole discretion,

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[11] It is, for instance, nonetheless the generally prevailing view that a power of sale contained in a mortgage is not to be exercised during the pendency of suit, 107 *American Law Reports* 721.

further colliding with well-established Fourteenth Amendment principles.

Indeed, the new, alternative, Hawaii nonjudicial foreclosure law intentionally seeks to free state courts from mounting foreclosure case backlogs by *encouraging* nonjudicial foreclosures through the hoped-for attractive elimination of deficiency judgments (otherwise prevalent in Hawaii) entirely under the new law, its Section 667-38, provided that the newer procedures are followed, thus state courts hoping to avoid increasingly drawn-out court battles over deficiency judgments in situations where mortgages on many Hawaii residences actually exceed true market values.

Fifth, Hawaii's 1874 nonjudicial foreclosure law, unlike those few, isolated state nonjudicial foreclosure laws which were earlier upheld as not constituting "state action," uniquely allows the sale to be conducted by a biased auctioneer – the lender or its current assignee itself -- who establishes the bidding rules and requirements for everyone.

Thus, even if the legislative enactment of nonjudicial sale procedures be thought *not in and of itself* to constitute "state action" so long as the parties theoretically are neither coerced nor encouraged to adopt such procedures in their private agreements, and even ignoring the obvious nature of such clauses as being contracts of adhesion, still when a state procedure allows biased decision making it crosses the "state action" line by legislating a private dispute resolution framework that violates due process of law due to its self-serving, conflicted terms and its clear lack of standards.

Even if it be taken as true, notwithstanding the nature of such government-sponsored adhesion contracts generally, or the changed regulatory mortgage environment, as explained *supra*, that the provision by a state of nonjudicial foreclosure procedures in its laws, assumed to be freely agreed to and thus ultimately invoked by triggering "power of sale" clauses contained within government-sponsored form mortgages, does not constitute "state action," a substantially different issue is raised where, as in Hawaii, those enacted 1874 procedures nevertheless provide for the

requisite decision making to be made, as to the marketing and bidding, and as to sales price, by the creditor only.

In Charmicor, *supra*, for instance, another panel of the Ninth Circuit in 1978 had before it a Nevada nonjudicial foreclosure law patterned after its then California counterpart, specifically providing, as do all other State nonjudicial foreclosure laws, that a neutral "trustee" -- and not the lender itself or its current assignee -- could only exercise a power of sale after a default, 572 F.2d at 695.[12]

But what about the ability of a state to enact a nonjudicial foreclosure process, such as that uniquely found in Hawaii's 1874 "old law," unlike that in Charmicor, which expressly directs that "the mortgagee, or the mortgagee's successor in interest, or any person authorized by the power to act in the premises, may, upon a breach of condition," itself conduct the nonjudicial foreclosure notice and sale?

The Ninth Circuit panel below, without any offered explanation, saw no difference.

The closest analogy to the propriety and constitutional acceptability of such incredibly *biased* dispute resolution procedures in relation to issues of "state action" can be found in those recent cases which have considered whether state-enacted arbitration procedures, for adoption in private agreements, constitutes "state action" for purposes of reviewing challenges to the procedures therein governing the qualification and selection of arbitrators.

In many respects, that is precisely – by analogy -- what nonjudicial foreclosure procedures do, or historically were intended to do, that is, to provide a swift alternative dispute resolution process for mortgage payment disputes.

The concern among jurists that state-enacted arbitration procedures, which can be elected by private

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[12] At the other extreme, in North Carolina nonjudicial foreclosure judgments were reviewed and made by a court clerk, Turner v. Blackburn, 389 F. Supp. 1250 (D. N.C. 1975) (found to be "state action").

contracting parties as an alternative dispute resolution mechanism outside state courts, which do not provide for unbiased decision making, might themselves violate due process guarantees and be considered to be "state action," even though "voluntary," surfaced in the Michigan courts with the passage of the Michigan Medical Malpractice Act which allowed for the election of arbitration with respect to medical malpractice claims.

The judicial debate which took place there is instructive. When the Michigan Court of Appeals first considered that issue, in Morris v. Metriyakool, 107 Mich. App. 110, 309 N.W.2d 910 (1981), that Court, by a three-to-one majority, rejected plaintiff's challenge to a provision requiring a physician be a member of each three-member arbitration panel as not violative of due process, without considering the additional issue however whether it would constitute "state action" if it were. Judge Bronson dissented in part, 309 N.W.2d at 913, concluding that the Michigan statute was unconstitutional, failing to provide a fair tribunal, although not being a "contract of adhesion."

The following year, in Strong v. Oakwood Hospital Corp., 118 Mich. App. 395, 325 N.W.2d 435 (1982), the majority of the Michigan Court of Appeals reversed itself, expressly adopting Judge Bronson's dissenting view that the statute was unconstitutional by failing to provide unbiased decision makers, and, although not a contract of adhesion due to the complex written waiver there required of a patient (not found in our case with respect to borrowers only), it found the challenged provision "unconscionable" nevertheless. Once again, no inquiry was made however as to whether the offending statute was to be viewed as "state action," although subject to the voluntary adoption supposedly of private parties.

Two years later, the issue was again examined, and this time decided by the Supreme Court of Michigan and again by a closely divided Court, two-to-one, in Morris v. Metriyakool, 418 Mich. 423, 344 N.W.2d 736 (1984), which for the first time addressed the "state action" issue in the

precise context of the impartiality of state-established nonjudicial decision making procedures, the majority on that basis, *inter alia*, overruling the Court of Appeals on grounds that the parties had voluntarily chosen the state's arbitration procedures; such agreements it additionally found not to be contracts of adhesion.

It is Justice Cavanagh's dissent in Morris, *supra*, however, that, it is submitted, contains the more persuasive reasoning in the context of the issues here, and which suggests that the nonjudicial foreclosure facts before us would have likely led not only Justice Cavanagh, but the entire Court in Morris, to have found "state action" instead there.[13]

It is after all considered axiomatic that "a fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias."[14]

For that reason, Justice Cavanagh, first of all, was unwilling to accept procedures where a physician was required to be one of the three arbitrators, having as a result, he believed, a built-in professional decision making *bias* – which, applying by analogy the Hawaii nonjudicial procedures utilized in these cases would of course be just like allowing the challenged physician to be his own judge – one need not wonder surely how Justice Cavanagh and his entire Court would have reacted to such a provision as that.

With respect to the "state action" issue itself, Justice Cavanagh's reasoning is further instructive, for after wading through the usual boilerplate "private action" rubrics found

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[13] Justice Cavanagh's dissent is all the more interesting in that prior thereto he had actually supported the constitutionality of the same Michigan statute in Williams v. O'Connor, 108 Mich. App. 613, 310 N.W.2d 825 (1981), and also in Cushman v. Frankel, 111 Mich. App. 604, 314 N.W.2d 705 (1981), before rethinking his views due to another judge's "very persuasive reasoning" in still another case decided the next year, Murray v. Wilner, 118 Mich. App. 352, 325 N.W.2d 422 (1982) (*per* Judge Kaufman); 344 N.W.2d at 758.

[14] In re Murchison, 349 U.S. 133, 136 (1955).

in Flagg Brothers and in Blum, *supra*, he argues, convincingly, that although there is no *initial* state action in private agreements to elect state-sponsored alternative dispute resolution procedures, "there is state action in the execution itself and after execution," 344 N.W.2d at 762, and that "although the state can acquiesce in one's choice of a dispute-resolution mechanism, it cannot statutorily mandate procedures pursuant to the mechanism selected which abridge constitutional rights. Consequently, it should be concluded that, under federal constitutional law, these cases involve state action," *id.* at 763.

That is a key distinction completely overlooked by both the district court and the Ninth Circuit panel below.

It is Justice Cavanagh's distinction, it is respectfully suggested, that makes the most sense, and that should be applied to Hawaii's 1874 non-judicial foreclosure law, for while private parties should be free to include "power of sale" clauses in mortgage contracts, on the assumption that such inclusion is not a contract of adhesion, which it however clearly is, unlike in Morris, nevertheless it is "state action" where the decision maker who must implement the chosen procedures has a built-in bias and controls the sale.[15]

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[15] It appears that the cases in this area have also been influenced in their holdings by the magnitude of the constitutional violations charged. Moreover, in the Morris cases, *supra*, there was general agreement that the arbitration contracts involved there were not contracts of adhesion (the patient being required to sign voluminous waiver forms), which appeared to influence several of the Judges and Justices in those cases. The reasoning of other courts has appeared somewhat more favorable to plaintiffs in cases where, for instance, racial or voting rights discrimination is alleged; see, *e.g.*, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (racial discrimination – "state action" found). Given the sharp appreciation of real property since the 1970s, when most of the earlier nonjudicial foreclosure cases were decided, the importance of a home to families, the proliferation of lending abuses, and the growing case law stressing the importance of impartial decision making in alternative dispute resolution situations, it is likely that this area of American law will now be more highly

V. CONCLUSION

In Dieffenbach v. Attorney General of Vermont, 604 F.2d 187, 195-196 (2d Cir. 1979), Circuit Judge Oakes, when confronted with a challenge to the constitutionality of an exceptionally harsh Vermont nonjudicial foreclosure law, was one of the first federal jurists to openly question the correctness of this Court's "state action" jurisprudence as "a somewhat arbitrary method of differentiation," underscoring the intellectual straightjacket that this Court's earlier "state action" decisions have created for the federal judiciary, calling attention to an alternative method of analysis that might make more sense, advanced by Professor Lawrence Tribe:

> Of course, the district court also referred to Flagg Brothers v. Brooks, 436 U.S. 149, 98 S.Ct. 1729 (1978), . . . The Court distinguished North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975); Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); and Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969), all imposing procedural restrictions on creditors' remedies, by pointing to the failure in Flagg Brothers to allege the participation of any public officials in the proposed sale. 436 U.S. at 157, 160 n.10, 98 S.Ct. at 1734. . . .
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> Professor Tribe suggests that in a case such as this, involving constitutional restraints on governmental rules, not on governmental actors, a court should focus not on the private or public status of the actor but on whether the challenged rule of law can validly distribute authority among governmental and

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regarded as well, and more closely analyzed henceforth, as these cases should be, and should have been below, from a consumer's point-of-view.

private actors as it purports to do.[16] Although such an approach might lead to easier analysis, the Supreme Court evidently requires us to determine initially whether there is "overt official involvement." In Fuentes, for example, as in Flagg Brothers, the state law allowing for ex parte prejudgment replevin had been incorporated into the contract between debtor and creditor but, unlike Flagg Brothers, a clerk was required, at the creditor's request, to make out the writ of replevin pursuant to which the sheriff seized the property. Similarly, in Sniadach the statute required the clerk of the court to issue the summons at the request of a creditor's lawyer and in North Georgia Finishing the court clerk issued the writ of garnishment based solely on an affidavit of the creditor. Although this seems to be a somewhat arbitrary method of differentiation we are bound to apply it.

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[16] "In its decision in Flagg Brothers, Inc. v. Brooks, the Court continued to elaborate upon the conventional but largely empty categories of state action. . . . The treatise advanced the argument that constitutional rights should define the characteristics of unconstitutional state action: to the extent that such rights impose restraints on governmental Actors only, the appropriate question is whether the actors who make a challenged decision are in fact governmental actors or are simply private actors. But to the extent that such rights impose restraints on governmental Rules and not on governmental actors, the proper question is whether the challenged federal or state rule of law can validly distribute among governmental and private actors as it purports to do. Justice Rehnquist's opinion for the majority in Flagg Brothers illustrates the incomprehensible results of the still popular approach to the state action inquiry an approach which continues to be marked by a single-minded search for the moving hand of a governmental actor in any action challenged as unconstitutional." L. Tribe, American Constitutional Law 105 (Supp. 1979) (footnotes omitted).

Professor Tribe, it is respectfully suggested, years ago identified a far better approach, *supra*, to the determination of "state action," and one that would clearly bring Hawaii's nonjudicial foreclosure law deservedly within its parameters.

Justice Holmes, in one of his most remembered teachings, put it another way:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[17]

Protecting a family's "single most important asset," its residence, has both immense social as well as economic importance, and inherent public policy value, determining where children go to school, where families worship, while family and friends reside, in the absence of which consumers may become dependent on public housing and welfare, parental control may become lost, marriages may break up, Sawada v. Endo, 57 Haw. 608, 616, 561 P.2d 1291 (1977).

This Court should reverse, and protect Apao's constitutional right to -- at the very least -- a hearing on the merits of her Complaint alleging unfair "state action."[18]

Respectfully submitted,

/s/ Gary Victor Dubin

GARY VICTOR DUBIN
Counsel for Petitioner

Honolulu, Hawaii
August 4, 2003

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[17] Justice Oliver Wendell Holmes, *Collected Legal Papers*, p. 187 (1920). Foreclosures under a power of sale in particular are universally "not favored in the law," and their exercise, it has been observed, should be "watched with jealously" by courts, Spain v. Hines, 214 N.C. 432, 435, 200 S.E. 25, 28 (1938).

[18] Section 2403(b) of Title 28 may apply to this Petition, as a result of which Petitioner continues to serve the Hawaii State Attorney General with copies of all filings on appeal, including this Petition; no certification to the State Attorney General was made however by the district court or by the court of appeals below.

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I. Order Granting Defendant ARM Financial Corporation's First Amended Motion To Dismiss Complaint For Failure To State A Claim Upon Which Relief May Be Granted, Civil No. 00-00557, filed March 5, 2001

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MARGARET A. APAO,	)	CV. NO. 00-00557
	)	
Plaintiff,	)	ORDER GRANTING
	)	DEFENDANT ARM
vs.	)	FINANCIAL
	)	CORPORATION'S
SAN DIEGO HOME LOANS,	)	FIRST AMENDED
INC., a California	)	MOTION TO DISMISS
Corporation, et al.,	)	COMPLAINT FOR
	)	FAILURE TO STATE A
Defendants.	)	CLAIM UPON WHICH
	)	RELIEF MAY BE
	)	GRANTED
	)	

ORDER GRANTING DEFENDANT ARM FINANCIAL CORPORATION'S FIRST AMENDED MOTION TO DISMISS COMPLAINT FOR FAILURE TO STATE CLAIM UPON WHICH RELIEF MAY BE GRANTED

The court heard Defendant's Motion on March 5, 2001. Gary Victor Dubin, Esq., appeared at the hearing on behalf of Plaintiff; K. Rae McCorkle, Esq., appeared at the hearing on behalf of Defendant ARM Financial Corporation. After reviewing the Motion and the Supporting and Opposing Memoranda, the court GRANTS Defendant's First Amended Motion to Dismiss Complaint for Failure to State Claim upon Which Relief May Be Granted.

BACKGROUND

Plaintiff Margaret Apao ("Plaintiff") seeks to set aside

the non-judicial foreclosure of her home which occurred because she defaulted on her mortgage payments. She filed a Complaint with this court on August 22, 2000. The Complaint was filed as a class action on behalf of "all borrowers in the State of Hawaii who have been or who are being foreclosed upon by named Defendants." Complaint, paragraph 11, at 4.

Through her Complaint, Plaintiff alleges nine causes of action.[1] Defendant ARM Financial Corporation ("ARM") is a foreclosure agent which was involved with the foreclosure sale that took place in Plaintiff's property. ARM filed this First Amended Motion to Dismiss on January 5, 2001.

In Plaintiff's Memorandum in Opposition, filed February 19, 2001,[2] Plaintiff concedes that out of the nine

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[1] The causes of action alleged are entitled as follows: Declaratory Relief Against Section 667-5 (Count One); Injunctive Relief Against Section 667-5 (Count Two); Recission [sic] Against Generalized Power-Of-Sale Clauses (Count Three); Damages for Nonjudicial Foreclosure (Count Four); Federal TILA and FTCA Violations (Count Five); Violations of Hawaii State Unfair and Deceptive Business Practices Act (Count Six); Entitlement to Mandatory State and Federal Cumulative Statutory Remedies (Count Seven); Declaratory Relief as to Legal Title (Count Eight); and Breach of Contract (Count Nine).

[2] Plaintiff's Memorandum in Opposition was due on February 15, 2001, which is eighteen days prior to the hearing date of March 5, 2001. See L.R. 7.4. Defendant asserted that Plaintiff's late filing caused a burden on Defendant, because it had a shortened time in which to formulate its Reply. Defendant did timely file its Reply Memorandum on February 22, 2001. In its Reply, Defendant suggested that in lieu of striking Plaintiff's Opposition, the court should consolidate the hearing on this Motion with a hearing on an identical motion filed in another case, to take place on April 10, 2001. The court declines to so consolidate. Although the court notes that Plaintiff's Opposition was untimely filed and does not condone untimely filing, the court has considered Plaintiff's Opposition nonetheless. Because the court dismissed Plaintiff's claims against Defendant, the court finds that Defendant was not prejudiced from having a shortened time in which to file its Reply.

counts alleged in her Complaint, only two apply to ARM. See Plaintiff's Memorandum in Opposition to Defendant ARM Financial Corporation's First Amended Motion to Dismiss Complaint at 29. Therefore, the court will GRANT the Motion to Dismiss Counts One, Three, Five, Six, Seven, Eight, and Nine as to Defendant ARM without further discussion. The court will limit its discussion to Counts Two and Four.

Count Two of the Complaint alleges that Hawaii Revised Statute chapter 667-5 is unconstitutional in that it deprives borrowers of their federal and state rights to Due Process. Count Four seeks monetary damages for losses incurred during Nonjudicial foreclosures.

STANDARD OF REVIEW

A motion to dismiss will be granted where the plaintiff fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12 (b) (6) . The Ninth Circuit has stated that the court should not dismiss a complaint for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Terracom v. Valley Nat'l Bank, 49 F.3d 555, 558 (9th Cir. 1995) (quoting Conley v Gibson, 355 U.S. 41, 45-46 (1957)).

Dismissal for failure to state a claim is a ruling on a question of law. Parks Sch. of Bus., Inc., v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995) . That is, " [t]he issue is not whether plaintiff will ultimately prevail, but whether he is entitled to offer evidence to support his claim. Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987). Review is limited to the contents of the complaint, Clegg v. Cult Awareness Network, 18 F.3d 752, 754 (9th Cir. 1994), including any attached exhibits, Symington, 51 F.3d at 1484. To the extent, however, that "matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment . " Fed. R. Civ. P . 12 (b) ; Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 920 F.2d 1496, 1507 (9th Cir. 1990).

Allegations of fact in the complaint must be taken as true and construed in the light most favorable to the non-moving party. Id. From the facts alleged, the court must draw all reasonable inferences in favor of the nonmoving party. Usher, 828 F.2d at 561. When examining a complaint, a court should be mindful that "conclusory allegations, without more, are insufficient to defeat a motion to dismiss." McGlinchy v. Shell Chem. Co., 845 F.2d 802, 810 (9th Cir. 1988). A court "is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." Clegg, 18 F.3d at 754-55.

DISCUSSION

In her Memorandum in Opposition to Defendant ARM's Motion to Dismiss, Plaintiff urges the court break new legal ground. Plaintiff challenges Section 667-5 of the Hawaii Revised Statutes, a non-judicial foreclosure statute, claiming that it is unconstitutional in that it violates Due Process as guaranteed by the Fourteenth Amendment to the United States Constitution. This court found no authority for the general proposition that non-judicial foreclosure statutes are unconstitutional. Moreover, this court found no authority for the proposition that Hawaii's statute gives rise to any state action, necessary to give rise to a constitutional claim. Plaintiff did not cite any authority to support her argument. Therefore, the court finds that Plaintiff's argument is meritless.

It is well-settled in American jurisprudence that the Fourteenth Amendment protects individuals from state action only. See Shelley v. Kramer, 334 U.S. 1, 13 (1948) . In fact, it is "firmly embedded in our constitutional law" that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful." Id. This is not a requirement merely superimposed by the courts; the Fourteenth Amendment itself specifies that it protects from state action. See U.S. Const. amend. XIV, § 1 (stating that "No State shall . . . deprive any person of life, liberty, or property, without due process of law").

Here, the court cannot find any state action created by

the statute which would give rise to a potential constitutional claim. The statute at issue reads, in pertinent part:

> When a power of sale is contained in a mortgage, the mortgagee . . . may, upon a breach of the condition, give notice of the mortgagee's . .. intention to foreclose the mortgage and of the sale of the mortgaged property, by publication of the notice once in each of three successive weeks (three publications), the last publication to be not less than fourteen days before the day of sale, in a newspaper having a general circulation in the county in which the mortgaged property lies . . . . Copies of the notice shall be files [sic] with the state director of taxation arid shall be posted on the premises not less than twenty-one days before the day of sale.
>
> . . . The mortgagee shall, within thirty days after selling the property in pursuance of the power, file a copy of the notice of sale and the mortgagee's affidavit, setting forth the mortgagee's acts in the premises fully and particularly, in the bureau of conveyances.
>
> The affidavit and copy of the notice shall be recorded and indexed by the registrar . . .

H.R.S. § 667-5 (Michie 2000). Nowhere does the statute itself implicate any state action. The statute merely embodies the right of private parties to execute an agreement between them.

Plaintiff argues to the court that it should find state action in for various reasons, but Plaintiff never really argues that it exists anywhere. The court declines to find state action merely so that it can give rise to a constitutional claim. The only argument the court could glean from Plaintiff's Memorandum in Opposition as to where state action could possibly exist is the following: that the "power of sale" clause in the standardized-form mortgage contract is an

adhesion contract which was written by government regulatory agencies.

Plaintiff cites no accurate authority for the proposition that the standardized-form mortgaged contract was written by the government regulatory agencies. Even if the statement were true, it does not implicate state action.

In the past, there have been several challenges to state non-judicial foreclosure statutes. Courts that have examined the constitutional validity of such statutes have almost uniformly found that the statutes do not involve state action. This is because state officials do not play any significant role, and usually play no role whatsoever, in the proceedings. In addition, the statutes authorizing "power of sale" foreclosures generally do not create the right or compel its exercise; they merely confirm a right recognized under common law and that exists in a given case by virtue of an agreement between the parties to the mortgage. See, e.g., Midfelt v. Circuit Court of Jackson County, 827 F.2d 343, 346 (8th Cir. 1987) (concluding that "there is no significant state involvement in the conduct of a trustee's sale and thus no state action" under Missouri extrajudicial foreclosure statute) ; Charmicor, Inc. v. Deaner, 572 F.2d 694, 696(9th Cir. 1978) (finding lack of state action where plaintiffs challenged Nevada non-judicial foreclosure statute on due process grounds) ; Levine v. Stein, 560 F.2d 1175, 1176 (4th Cir. 1977) (following other Circuits in its determination that Virginia foreclosure statutes do not involve sufficient state action to maintain federal question jurisdiction, i.e. to state claim for unconstitutionality); Northrip v. Federal National Mortgage Assoc., 527 F.2d 23, 33 (6th Cir. 1975) ; Barrera v. Security Building & Investment Corp., 519 F.2d 1166, 1174 (5th Cir. 1974) (concluding that no significant state involvement exists in non-judicial foreclosure under Texas statute) ; Bryant v. Jefferson Federal Savings and Loan Association, 509 F.2d 511, 513 (D.C. Cir. 1974) (finding no significant government involvement in extrajudicial mortgage foreclosure practices under D.C. statute). Cf. Flagg Brothers, Inc. v. Lefkowitz, 436 U.S. 149, 164-65 (1978) (dismissing suit challenging self-help provision of New York

Uniform Commercial Code as violative of due process for lack of state action; finding that state action does not exist merely because legislature has enacted statute that enables private parties to act; noting that it is "quite immaterial that the State has embodied its decision not to act in statutory form"). But see Turner v. Blackburn, 389 F. Supp. 1250, 1254 (W.D.N.C. 1975) (finding that because Sheriff and court clerk participate in North Carolina's foreclosure procedure, sufficient state action existed to render statute unconstitutional).

Although Plaintiff correctly asserts that no party has yet challenged the Hawaii State statute, the court does not agree that its provisions are more "draconian" than those already reviewed by other courts. In fact, the procedures and provisions of the Hawaii statute are extremely similar if not the same to those already challenged. Though Plaintiff's passion is admirable, the court declines to find state action based on policy arguments as to why it should, rather than why it actually exists. Because this court finds insufficient state action to support a due process challenge to H.R.S. § 667-5, and because no other court has so found with respect to similar state non-judicial foreclosure statutes, the court will GRANT the Motion to Dismiss Counts 2 and 4 as to Defendant ARM.

CONCLUSION

For the reasons stated above, the court GRANTS Defendant's First Amended Motion to Dismiss Complaint for Failure to State Claim Upon Which Relief May Be Granted.[3]

DATED: Honolulu, Hawaii; May 5, 2001.

DAVID ALAN EZRA
UNITED STATES
DISTRICT JUDGE

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[3] If Plaintiff believes her claims against this Defendant can be redressed in State court, she is free to seek relief there.

II. Judgment in a Civil Case,
Civil No. 00-00557, filed July 6, 2001

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MARGARET A. APAO,	)	CV. NO. 00-00557
	)	
Plaintiff,	)	JUDGMENT IN A
	)	CIVIL CASE
vs.	)	
	)	
SAN DIEGO HOME LOANS, INC., a California Corporation, et al.,	)	
	)	
Defendants.	)	

DECISION BY COURT: This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, Judgment is entered in favor of Defendant ARM Financial Corporation and against Plaintiff Margaret A. Apao, pursuant to the "Order Granting Defendant ARM Financial Corporation's Motion For Order Directing Entry of Final Judgment Pursuant to Rule 54(B)" filed on June 28, 2001.

July 6, 2001 *WALTER A.Y.H. CHINN*
CLERK

III. Opinion, United States Court of Appeals for the Ninth Circuit, Case No. 01-16565, filed April 4, 2003, 324 F.3d 1091 (9th Cir. 2003)
FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARGARET A. APAO, Plaintiff-Appellant, v. THE BANK OF NEW YORK, as Trustee for Amresco Residential Securities Corporation Mortgage Loan Trust 1997-3 Under the Pooling & Servicing Agreement dated as 9/1/97; SAN DIEGO HOME LOANS, INC., a California corporation, Defendants, and ARM Financial Corporation, a California corporation, Defendant-Appellee.	NO. 01-16565 D.C. No. CV-00-00557-DAE(KSC) OPINION

Appeal from the United States District Court
for the District of Hawaii
David A. Ezra, District Judge, Presiding
Argued and Submitted
November 6, 2002 – Honolulu, Hawaii
Filed April 4, 2003
Before: Mary M. Schroeder, Chief Judge, Arthur L. Alarcon and Raymond C. Fisher, Circuit Judges.

OPINION

SCHROEDER, Chief Judge:

Plaintiff-appellant Margaret Apao lost her home to a foreclosure and sale under procedures provided for in her mortgage contract and authorized under Hawaii's non-judicial foreclosure statute. *See* Haw. Rev. Stat. § 667-5. She filed this action in federal district court challenging that statute as violating the due process clause of the Fourteenth Amendment.

The district court dismissed the case for failure to state a claim because the sale was a purely private remedy and involved no state action. Apao appealed. In effect, she asks us to reconsider the round of decisions by this circuit and others a generation ago that upheld the constitutionality of similar statutorily authorized sale procedures. *See, e.g., Charmicor, Inc. v. Deaner*, 572 F.2d 694, 696 (9th Cir. 1978); *cf. Adams v. S. Cal. First Nat'l Bank*, 492 F.2d 324 (9th Cir. 1974). We conclude there has been no legal or historical development in the intervening years that would require a departure from prior authority. We therefore affirm.

Margaret Apao obtained an approximately $280,000 mortgage on her Honolulu residence in June of 1997 from defendant San Diego Home Loans, Inc. The mortgage agreement included the following power of sale . . . . clause:

> 19. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration . . . . The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured . . . . If the default is not cured . . .

> Lender, at its option . . . may invoke the power of sale. . . .

Such a contractual remedy is authorized under Haw. Rev. Stat. § 667-5, which provides in relevant part:

> When a power of sale is contained in a mortgage, the mortgagee, or the mortgagee's successor in interest, or any person authorized by the power to act in the premises, may, upon a breach of the condition, give notice of the mortgagee's, successor's, or person's intention to foreclose the mortgage and of the sale of the mortgaged property, by publication of the notice once in each of three successive weeks (three publications), the last publication to be not less than fourteen days before the day of sale, in a newspaper having a general circulation in the county in which the mortgaged property lies; and also give such notices and do all such acts as are authorized or required by the power contained in the mortgage. Copies of the notice shall be filed with the state director of taxation and shall be posted on the premises not less than twenty-one days before the day of sale.

Three years into her mortgage, Apao notified San Diego Home Loans that she intended to cancel and rescind the mortgage and make no further payments because of perceived violations of the Truth and Lending Act, 15 U.S.C. § 1601. San Diego Home Loans then instituted a non-judicial foreclosure, hiring defendant-appellee ARM Financial Corporation to assist. ARM followed the provisions of the contract and sold the property in a foreclosure sale on August 22, 2000.

Apao immediately filed her complaint and styled it a class action. The district court granted the defendant-appellee's motion to dismiss in March of 2001 and entered final judgment in June of 2001. This appeal followed.

[1] The Fourteenth Amendment provides: "No state shall . . . deprive any person of life, liberty, or property, without due process of law." It thus shields citizens from unlawful governmental actions, but does not affect conduct by private entities. In *Shelley v. Kraemer*, 334 U.S. 1, 13-14 (1948), the Supreme Court held that what would otherwise be private conduct, i.e., placing a racially restrictive covenant in a deed, can violate the Fourteenth Amendment when state action in the form of a court order is sought to enforce its restrictive provisions.

[2] Similarly, in cases involving foreclosures or seizures of property to satisfy a debt, the Supreme Court has held that the procedures implicate the Fourteenth Amendment only where there is at least some direct state involvement in the execution of the foreclosure or seizure. *See Fuentes v. Shevin*, 407 U.S. 67, 70-71 (1972) (clerk of court made out writ of replevin authorizing seizure of property by sheriff); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 338-39 (1969) (clerk of court issued summons at request of creditor's counsel, setting in motion garnishment of wages). More recently, in *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982), the Court found state action where a creditor's ex parte petition for a writ of prejudgment attachment was executed by the county sheriff, sequestering the property pending adjudication of the claim. *Id.* at 924-25, 941-42.

[3] In contrast, in a case materially similar to this one, when a creditor enforced a lien through a purely private, non-judicial sale, the Supreme Court held that there was no state action, even though the lien was authorized by the state's legislative enactment of the Uniform Commercial Code. *See Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978). In *Flagg Bros.*, as in the case before us, the debtor argued first that the legislative grant of a private power of sale was a delegation of a traditional government function, and second, that the statutory authorization constituted state encouragement of such

non-judicial remedies. The Supreme Court considered and rejected both arguments.

[4] The Court held that legislative approval of a private self-help remedy was not the delegation of a public function. *Id.* at 158-60. As a number of circuits have noted, self-help foreclosure remedies have existed since early in the common law, and thus one cannot say that the power of foreclosure is one traditionally belonging only to the government. *See, e.g., Barrera v. Sec. Bldg. & Inv. Corp.*, 519 F.2d 1166, 1172-3 (5th Cir. 1975); *Bryant v. Jefferson Fed. Sav. & Loan Ass'n*, 509 F.2d 511, 515 (D.C. Cir. 1974). Our Circuit shares this view. *See Adams*, 492 F.2d 324, 330.

[5] *Flagg Bros.* further held that the state's statutory authorization of self-help provisions is not sufficient to convert private conduct into state action. 436 U.S. at 164-65. The statute neither encourages nor compels the procedure, but merely recognizes its legal effect. The state "has not compelled the sale of a [debtor's property], but has merely announced the circumstances under which its courts will not interfere with a private sale." *Id.* at 166.

The Fifth Circuit put it this way:

> To hold that the state, by recognizing the legal effect of those arrangements, converts them into state acts for constitutional purposes would effectively erase . . . the constitutional line between private and state action and subject to judicial scrutiny under the Fourteenth Amendment virtually all private arrangements that purport to have binding legal effect.

Barrera, 519 F.2d at 1170.

[6] When the constitutionality of such statutes was challenged in a series of cases beginning in the 1970s, six circuits, including our own, found that the provisions did not violate

the Fourteenth Amendment. They held there was no state action in either the availability of such private remedies or their enforcement. *See Mildfelt v. Circuit Court of Jackson County*, 827 F.2d 343, 346 (8th Cir. 1987) (finding no state action where power of sale was conferred by contract and merely recognized by statute); *Charmicor, Inc. v. Deaner*, 572 F.2d 694, 696 (9th Cir. 1978) (finding no state action where plaintiffs challenged Nevada's non-judicial foreclosure statute on due process grounds); *Levine v. Stein*, 560 F.2d 1175, 1176 (4th Cir. 1977) (concluding that foreclosure procedures entail insufficient state action to support constitutional challenge); *Northrip v. Fed. Nat'l Mortg. Ass'n*, 527 F.2d 23, 28-29 (6th Cir. 1975) (finding no state action in non-judicial foreclosure, notwithstanding involvement of sheriff and register of deeds); *Barrera v. Security Bldg. & Inv. Corp.*, 519 F.2d 1166, 1174 (5th Cir. 1975) (finding no state action); and *Bryant v. Jefferson Federal Sav. & Loan Ass'n*, 509 F.2d 511, 513 (D.C. Cir. 1974) (finding no significant state action in non-judicial foreclosure procedures). Those decisions have not been seriously questioned in the intervening years.

Appellant attempts to distinguish *Charmicor*, the controlling case in our circuit, on the ground that the foreclosure sale there was conducted by a neutral trustee, *see* 572 F.2d at 695, while the sale here was conducted by a self-interested lender. The distinction is not material in this case. Any procedural concerns that may arise from use of a self-interested foreclosure agent do not relate to the threshold, and here dispositive question as to whether there was state action. In *Charmicor*, we rejected a due process challenge to Nevada's non-judicial foreclosure statute because there was insufficient state involvement to attribute the foreclosure to the state itself. That conclusion is even more strongly compelled here, where the state did not confer the power of sale, but merely authorized the parties to contract for the express terms of foreclosure upon default.

[7] Appellant suggests that because the residential mortgage business is regulated by both state and federal laws for

the interests of the consumer, any action of the mortgage lenders is converted into state action. We have rejected that argument as well. "The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 (1974). Our court has explained the reason: "Statutes and laws regulate many forms of purely private activity, such as contractual relations and gifts, and subjecting all behavior that conforms to state law to the Fourteenth Amendment would emasculate the state action concept." *Adams*, 492 F.2d at 330-31. Thus, contrary to Apao's assertions, the development of the extensively regulated secondary mortgage market does not convert the private foreclosure procedures at issue here into state action.

[8] What is required for state action in this area is "overt official involvement" in the enforcement of creditors' remedies. Thus, in *Flagg Bros.*, where there was a "total absence of overt official involvement," 436 U.S. at 157, there was no state action. There is none here. While the bar for state action is low, *see Shelley v. Kraemer*, 334 U.S. at 13-14, non-judicial foreclosure procedures like Hawaii's nevertheless slip under it for want of direct state involvement.

AFFIRMED.

IV. Order Denying Petition for Rehearing, United States Court of Appeals for the Ninth Circuit, Case No. 01-16565, filed May 5, 2003
NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARGARET A. APAO,	NO. 01-16565
	D.C. No.
Plaintiff-Appellant,	CV-00-00557-DAE(KSC)
v.	District of Hawaii
THE BANK OF NEW YORK, as Trustee for Amresco Residential Securities Corporation Mortgage Loan Trust 1997-3 Under the Pooling & Servicing Agreement dated as 9/1/97; SAN DIEGO HOME LOANS, INC., a California corporation,	ORDER
Defendants,	
and	
ARM Financial Corporation, a California corporation,	
Defendant-Appellee.	

Before: SCHROEDER, Chief Judge, ALARCON, and FISHER, Circuit Judges.

The petition for rehearing is DENIED.

FILED

SEP 5 2003

OFFICE OF THE CLERK

No. 03-214

In The

Supreme Court of the United States

MARGARET A. APAO,

Petitioner,

v.

THE BANK OF NEW YORK, As Trustee For Amresco Residential Mortgage Loan Trust 1997-3 Under The Pooling & Servicing Agreement Dated As Of September 1, 1997, SAN DIEGO HOME LOANS, INC., a California corporation, and ARM FINANCIAL CORPORATION, a California Corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT ARM FINANCIAL CORPORATION'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a private mortgagee's non-judicial foreclosure and sale of a mortgaged residence as permitted by Hawaii's non-judicial foreclosure statute, Haw. Rev. Stat. § 667-5, is an action properly attributable to the State of Hawaii or the federal government.

STATEMENT PURSUANT TO RULE 29.6

There is no parent corporation or any publicly held company that owns 10% or more of the stock in Respondent ARM Financial Corporation.

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STATUTE INVOLVED

Hawaii Revised Statutes § 667-5 Foreclosure under power of sale; notice; affidavit after sale.

When a power of sale is contained in a mortgage, the mortgagee, or the mortgagee's successor in interest, or any person authorized by the power to act in the premises, may, upon a breach of the condition, give notice of the mortgagee's, successor's, or person's intention to foreclose the mortgage and of the sale of the mortgaged property, by publication of the notice once in each of three successive weeks (three publications), the last publication to be not less than fourteen days before the day of sale, in a newspaper having a general circulation in the county in which the mortgaged property lies; and also give such notices and do all such acts as are authorized or required by the power contained in the mortgage. Copies of the notice shall be filed with the state director of taxation and shall be posted on the premises not less than twenty-one days before the day of sale.

Any sale, of which notice has been given as aforesaid, may be postponed from time to time by public announcement made by the mortgagee or by some person acting on the mortgagee's behalf. The mortgagee shall, within thirty days after selling the property in pursuance of the power, file a copy of the notice of sale and the mortgagee's affidavit, setting forth the mortgagee's acts in the premises fully and particularly, in the bureau of conveyances.

The affidavit and copy of the notice shall be recorded and indexed by the registrar, in the manner provided in chapter 501 or 502, as the case may be.

This section is inapplicable if the mortgagee is foreclosing as to personal property only.

STATEMENT OF THE CASE

Petitioner Margaret Apao obtained a mortgage on her Honolulu residence in June of 1997 from Respondent San Diego Home Loans, Inc. The mortgage agreement included a power of sale clause providing that if Petitioner defaulted on her mortgage payments, the borrower would notify Petitioner of her default, inform Petitioner what she needed to do to cure the default, and give her not less than 30 days to effectuate the cure. If the default was not cured, the lender could, at its option, invoke a power of sale.

Hawaii Revised Statutes ("HRS") § 667-5 provides in pertinent part:

> When a power of sale is contained in a mortgage, the mortgagee, or the mortgagee's successor in interest . . . may, upon a breach of the condition, give notice of the mortgagee's . . . intention to foreclose the mortgage and of the sale of the mortgaged property, by publication of the notice once in each of the three successive weeks (three publications), the last publication to be not less than fourteen days before the day of sale. . . . Copies of the notice shall be filed with the state director of taxation and shall be posted on the premises not less than twenty-one days before the day of sale.
>
> . . . The mortgagee shall, within thirty days after selling the property in pursuance of the power, file a copy of the notice of sale and the mortgagee's affidavit, setting forth the

> mortgagee's acts in the premises fully and particularly, in the bureau of conveyances.

Three years into her mortgage, Petitioner notified San Diego Home Loans that she intended to cancel and rescind the mortgage and make no further payments because of perceived violations of the Truth In Lending Act, 15 U.S.C. § 1601. Respondent Bank of New York, which had taken assignment of San Diego Home Loans' interest in the Apao mortgage, caused Respondent ARM Financial Services ("ARM") to conduct a non-judicial foreclosure and sale of Petitioner's residence in accord with HRS § 667-5. ARM followed the provisions of the contract and the statute and sold the property at a foreclosure sale in August of 2000.

Petitioner thereupon sued each of the Respondents claiming that their actions under HRS § 667-5 violated her federal and state constitutional due process rights. She did not name any state or federal defendants. Respondent ARM moved to dismiss on the ground that Petitioner's complaint failed to state a claim because it did not plead the requisite state action needed to sustain a constitutional challenge. In response, Petitioner argued, in part, that use of a "power of sale" provision in her mortgage contract was required by federal regulatory agencies. She cited only one federal regulation to support this argument, 24 C.F.R. § 203.17. The District Court granted ARM's motion.

Petitioner appealed to the United States Court of Appeals for the Ninth Circuit, which affirmed the District Court. Petitioner sought rehearing, which was also denied by the court of appeals. This petition followed.

ARGUMENT

I. THE NINTH CIRCUIT'S RULING WAS PROPERLY DECIDED IN ACCORD WITH THIS COURT'S DECISION IN *FLAGG BROTHERS, INC. V. BROOKS*

The Ninth Circuit held that Respondent ARM's reliance on Hawaii's non-judicial foreclosure statute to secure the foreclosure and sale of Petitioner's residence did not implicate state action. In reaching this determination, the court of appeals correctly noted that Petitioner's case was materially similar to the facts underlying this Court's ruling in *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978), where a creditor enforced a lien through a purely private, non-judicial sale authorized under state law. This Court held there was no state action even though the lien was authorized by the state's legislative enactment of the Uniform Commercial Code. In *Flagg*, as in the instant Petition, the debtor argued first, that the legislative grant of the power of sale was a delegation of a traditionally governmental function, and second, that the statutory authorization constituted state action because the State had encouraged use of the procedure through its enactment of the contested statute. This Court disagreed. The Court noted that it had "never held that a State's mere acquiescence in a private action converts that action into that of the State." *Id.* at 164. The Court explained:

> It is quite immaterial that the State has embodied its decision not to act in statutory form. If New York had no commercial statutes at all, its courts would still be faced with the decision whether to prohibit or to permit the sort of sale threatened here the first time an aggrieved bailor came before them for relief. A judicial decision to deny relief would be no less an

> "authorization" or "encouragement" of that sale than the legislature's decision embodied in this statute.

Id. at 166. The Court added that "the State of New York has not compelled the sale of a bailor's goods, but merely announced the circumstances under which its courts will not interfere with a private sale." *Id.* The Court added:

> Indeed, the crux of [plaintiff's] complaint is not that the State *has* acted, but that it has *refused* to act. This statutory refusal to act is no different in principle from an ordinary statute of limitations whereby the State declines to provide a remedy for private deprivations of property after the passage of a given period of time.

Id. at 166 (emphasis in the original).

Petitioner has advanced no sound reason for the Court to abandon its holding in *Flagg Brothers*. The determination was consistent with then extant state action law and remains so today. The Ninth Circuit properly applied this otherwise sound ruling to a very similar fact pattern. The application was correctly undertaken and does not call for a review by this Court.

II. THE NINTH CIRCUIT'S RULING IS IN ACCORD WITH A LONG LINE OF UNBROKEN CIRCUIT COURT PRECEDENT

Petitioner's challenge echoes those brought against state non-judicial foreclosure statutes in the 1970s. Six circuits, including the Ninth Circuit, then held that such actions failed to state constitutional claims for want of state action. *See Bryant v. Jefferson Federal Savings And Loan Assoc.*, 509 F.2d 511 (D.C. Cir. 1974) (District of

Columbia non-judicial foreclosure statute creates no right to a power of sale; it simply sanctions what the parties have contracted to); *Levine v. Stein*, 560 F.2d 1175 (4th Cir. 1977), *cert. denied*, 434 U.S. 1046 (1978) (Virginia's non-judicial foreclosure statute does not involve sufficient state action to permit a constitutional challenge); *Barrera v. Security Building & Investment Corp.*, 519 F.2d 1166, 1174 (5th Cir. 1975) (fact that Texas' non-judicial foreclosure statute recognizes a change in ownership from the forced sale does not create sufficient state action; likewise, fact that state has regulated the activity does not mean that conduct taken in conformity with the regulations imputes state action); *Northrip v. Federal Nat'l Mortg. Assoc.*, 527 F.2d 23 (6th Cir. 1975) (fact that foreclosure sale under Michigan's non-judicial foreclosure statute was conducted by sheriff and recorded by registrar of deeds was insufficient to create state action required by the Fourteenth Amendment); *Mildfelt v. Circuit Court of Jackson County*, 827 F.2d 343 (8th Cir. 1987) (no state action because Missouri's non-judicial foreclosure statute merely recognized the parties' right to contract to a power of sale provision and imposed only minimum standards for its exercise); and *Charmicor, Inc. v. Deaner*, 572 F.2d 694 (9th Cir. 1978) (Nevada's power of sale statute does not transform a private non-judicial foreclosure statute into state action, instead the statute creates only the right to act; it does not require that such action be taken). As noted by the Ninth Circuit in its opinion subject to the instant Petition, these decisions have not been seriously questioned in the intervening years.

The number and uniformity of these rulings, when taken in conjunction with this Court's decision in *Flagg Brothers,* further illustrate the soundness of the Ninth

Circuit's determination that no state action was present under the facts alleged in Petitioner's complaint. Given this well-established line of authority, review of the court of appeals' decision is especially unwarranted.

III. PETITIONER HAS RELIED ON NON-RECORD EVIDENCE

Petitioner's Statement of the Case represents that actions undertaken by quasi-federal agencies, commonly known as Fannie Mae and Freddie Mac, direct the secondary mortgage market to use Hawaii's non-judicial foreclosure process, and that one of the agencies, Freddie Mac, directed use of HRS § 667-5, prior to the foreclosure on Petitioner's property. *See* Petition at 6-9. This evidence was not presented to the district court and not otherwise considered by the court of appeals at the time it issued its merits ruling on April 4, 2003.

This Court has demonstrated a long-established reluctance to review decisions on the basis of non-record evidence not considered by the courts below. *See e.g.*, *Russell v. Southard*, 12 How. 139, 159 (1851) ("This court must affirm or reverse upon the case as it appears in the record"); and *Adickes v. Kress & Co.*, 398 U.S. 144, 157-58 n.16 (1970) ("Manifestly, it [an unsworn witness statement never considered by the trial court] cannot be properly considered by us in the disposition of the case"). The

Court should not consider the Petition in light of these purported directives.[1]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[1] So too, the Court should not consider Petitioner's reliance on R. H. Stauffer, *Land Tenure in Kahana, Hawai'i 1846-1920* (1990), which was not brought to the attention of the district court or the court of appeals at the time of their merits rulings.